

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

FRANCISCO MONTESERIN-
RODRIGUEZ,

Plaintiff

v.

WILFREDO ESTRADA-ADORNO,
LILLIAM ALVAREZ et al.,

Defendants

CIVIL 08-2302 (FAB) (JA)

OPINION AND ORDER

This matter comes before the court on a pro-se complaint (which seeks to be converted to a class action) filed by inmate Francisco Monteserin Rodriguez, an inmate at El Zarzal prison camp in Rio Grande, Puerto Rico. The complaint is filed pursuant to 42 U.S.C. § 1983. Plaintiff claims that his Fourteenth Amendment right to equal protection under the law (being discriminated against for being a male) has been violated because as a male, he is being treated differently than similarly situated females in that he is not offered rehabilitation programs leading to parole. As petitioner is proceeding pro se, I will construe the pleadings, however inartful, liberally. See Erickson v. Pardus, 551 U.S. 89, 94 (2007) (following Estelle v. Gamble, 429 U.S. 97, 106 (1976) and Haines v. Kerner, 404 U.S. 519, 520-21 (1972)). "The policy behind affording pro se plaintiffs liberal interpretation is that if they present sufficient facts, the court

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may intuit the correct cause of action, even if it was imperfectly pled." See Castro v. United States, 540 U.S. 375, 381 (2003) (noting that courts may construe pro se pleadings so as to avoid inappropriately stringent rules and unnecessary dismissals of claims). All of the factual assertions made by a pro se plaintiff and inferences reasonably drawn therefrom must be accepted as true. See Ahmed v. Rosenblatt, 118 F.3d 886, 890 (1st Cir. 1997). A complaint requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Erickson v. Pardus, 551 U.S. at 93 (quoting Fed. R. Civ. P. 8(a)(2)). "The complaint must allege 'a plausible entitlement to relief' in order to survive a motion to dismiss." Thomas v. Rhode Island, 542 F.3d 944, 948 (1st Cir. 2008) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007)). That the complaint allege a conceivable entitlement of relief is insufficient. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950-51 (2009). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Damon v. Moore, 520 F.3d 98, 102-03 (1st Cir. 2008), cert. denied, 129 S. Ct. 175 (2008) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. at 555). The complaint will be dismissed if it "fails to set forth 'factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory.'" Gagliardi

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v. Sullivan, 513 F.3d 301, 305 (1st Cir. 2008) (quoting Centro Médico del Turabo, Inc. v. Feliciano de Melecio, 406 F.3d 1, 6 (1st Cir. 2005)).

Petitioner alleges in his complaint that he feels discriminated against since he has not been given services and necessary therapies in order to qualify for diversion programs linked to parole. He alleges that this has been a clear practice of the Department of Corrections since by not receiving services and therapies, he can never qualify for community rehabilitation programs so that he must extinguish his complete sentence. He notes that this is not the same manner in which female convicts are treated. Petitioner seeks punitive damages in the amount of \$250,000 and a discontinuance of discrimination. The last summons was returned on March 3, 2009 and there has been veritably no further action in this case since then.

Section 1983 creates a cause of action against those who, acting under color of state law, violate federal constitutional or statutory law. See 42 U.S.C. § 1983¹; Parratt v. Taylor, 451 U.S. 527, 535 (1981) (overruled on other grounds by Daniels v. Williams, 474 U.S. 327, 330-331 (1986)); Wilson v.

¹42 U.S.C. § 1983 provides that:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law

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3 Town of Mendon, 294 F.3d 1, 6 (1st Cir. 2002); see Sanchez Rodriguez v.
4 Departamento de Corrección y Rehabilitación, 537 F. Supp. 2d 295, 296 n.1
5 (D.P.R. 2008). In order for a petitioner to be held liable under § 1983, his or
6 her conduct must have caused the alleged constitutional or statutory
7 deprivation. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 692 (1978);
8 Soto v. Flores, 103 F.3d 1056, 1061-62 (1st Cir. 1997). Because Monteserin-
9 Rodriguez's claims allege violations of federal constitutional law effected by
10 state actors, his suit properly arises under § 1983, because of the allegedly
11 disparate treatment he is being subjected to when compared to the treatment
12 received by women, all in violation of his rights to equal protection
13 under the Fourteenth Amendment equal. In order to establish an equal
14 protection violation, plaintiff must:

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18 adduce sufficient evidence from which a rational
19 jury reasonably could conclude that, compared with others
20 similarly situated, he was selectively treated . . . based on
21 impermissible considerations such as race, religion, intent
22 to inhibit or punish the exercise of constitutional rights, or
23 malicious or bad faith intent to injure a person.

24 Tapalian v. Tusino, 377 F.3d 1, 5 (1st Cir. 2004) (internal citations omitted).

25 "Selective enforcement claims are judged according to ordinary Equal
26 Protection standards, which require a petition to show both a discriminatory
27 purpose and a discriminatory effect." Gardenhire v. Schubert, 205 F.3d 303,
28 318 (6th Cir. 2000).

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Petitioner, for purposes of the equal protection analysis, must demonstrate that he has been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." See Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000); Wojcik v. Mass. State Lottery Comm'n, 300 F.3d 92, 104 (1st Cir. 2002). An equal protection claim succeeds only if the decision to treat plaintiff differently than those similarly situated is wholly "arbitrary or irrational." Me. Cent. R.R. Co. v. Bhd. of Maint. of Way Employees, 813 F.2d 484, 492 (1st Cir. 1987). Plaintiff must demonstrate that the selective treatment he suffered as a male "was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure [plaintiff]." Rubinovitz v. Rogato, 60 F.3d 906, 910 (quoting Yerardi's Moody St. Rest. & Lounge, Inc. v. Bd. of Selectmen, 878 F.2d 16, 21 (1st Cir. 1989)). Further, to allege a selective treatment claim based on malicious intent or bad faith of a government official, plaintiff "must establish more than that the government official's actions were simply arbitrary or erroneous; instead the plaintiff must establish that the defendant's actions constituted a 'gross abuse of power.'" Tapalian, 377 F.3d at 6 (citing Baker v. Coxe, 230 F.3d 470, 474 (1st Cir. 2000), Rubinovitz, 60 F.3d at 912 (nothing that "gross abuse of power" may obtain where official harbors personal hostility

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toward plaintiff, and undertakes a "malicious orchestrated campaign causing substantial harm"), and Vill. of Willowbrook, 528 U.S. at 566 (Breyer, J., concurring) (discussing necessity of demonstrating "extra factors" to establish equal protection violation, such as "vindictive action," "illegitimate animus," or "ill will").

Here, petitioner has failed to allege facts that demonstrate a violation of each of the elements of his Fourteenth Amendment equal protection claim. To demonstrate selective treatment, petitioner gives no facts except for a conclusory statement which does not lead to a conclusion that there has been selective treatment against him as a male.

Even granting that petitioner has stated he was subjected to selective treatment by the defendants because of his gender, he has failed to allege any facts which demonstrate that such lack of opportunity for treatment or programs was unconstitutional. Petitioner has not alleged that the selective treatment was based on impermissible considerations, as set out in Rubinovitz, 60 F.3d at 910. Further, to the extent that petitioner rests his Fourteenth Amendment claim on generalized malicious intent or bad faith, there are no facts alleged which allow me to find that such an intention was at work in denying his access to rehabilitation programs, and that any denial to participate in programs constituted a "gross abuse of power" by defendants.

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3 See Tapalian, 377 F.3d at 6. There is no constitutional right to rehabilitative
4 training or treatment. See Santana v. Collazo, 533 F. Supp. 966, 976-77, 992
5 (D.P.R. 1982), rev'd on other grounds Santana v. Collazo, 714 F.2d 1172,
6 1177 (1st Cir. 1983). Finally, the opportunity for parole is a privilege, not a
7 right.
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10 In view of the above, the complaint be dismissed for failing to state a
11 claim upon which relief might be granted. The Clerk is directed to enter
12 judgment accordingly.

13 At San Juan, Puerto Rico, this 28th day of December, 2009.
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16 S/ JUSTO ARENAS

17 Chief United States Magistrate Judge
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